IN THE

Supreme Court of the United States

October Term, 1941.

DOCKET No. 280.

ROSCO JONES, *Petitioner*,

v.

CITY OF OPELIKA, *Respondent*.

On Petition for Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

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TABLE OF CONTENTS.

Subject Index.

CITATIONS.

Cases.

UNITED STATES CONSTITUTION.

STATUTES.

ORDINANCE.

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OPINION.

The opinion of the Supreme Court of Alabama, not yet officially reported, appears in the Record at pp. 3 to 9, and the judgment of that Court appears in the Record at pp. 2 and 3. The opinion of the Alabama Court of Appeals, not yet officially reported, appears in the Record at pp. 62 to 65.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)). The judgment of the Supreme Court of Alabama was entered on May 22, 1941 (R. 2). The petition for writ of certiorari

has been improvidently filed, and this Court is without jurisdiction to consider the matters raised since the judgment of which petitioner complains is not final within the meaning of Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

QUESTION PRESENTED.

Whether or not a municipal ordinance prescribing license or privilege taxes for trades, vocations and professions conducted within the City of Opelika deprived petitioner, a street vendor of religious literature, of his Constitutional right of "freedom of press, speech or of conscience and the worship of Almighty God" in the face of his refusal to pay the prescribed tax and secure the license provided for by said ordinance.

MUNICIPAL ORDINANCE INVOLVED.

The "City License Schedule for 1939" is a municipal ordinance prescribing "the rates for license or privilege taxes for trades, vocations, professions and other businesses conducted within the City of Opelika, Alabama, and its police jurisdiction," and containing certain "conditions and provisions for the conduct thereof" and "penalties for the violation of said ordinance". Separately listed therein are numerous trades, vocations, professions and other businesses, together with the rate of tax applicable to each, and Section 12 thereof provides a procedure for the creation of other classifications not listed in the Schedule. Among the trades, vocations and professions listed is that of "Book Agent (Bibles excepted)—$10.00." The ordinance *in toto* will be found on pp. 21 through 38 of the Record.

CONSTITUTIONAL PROVISIONS INVOLVED.

Petitioner asserts that Amendment I and Section 1 of Amendment XIV of the Federal Constitution are violated by the operation of the foregoing ordinance in its effect on him.

"Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner is identified as an ordained minister of the Gospel of Jehovah's Kingdom and represents himself to be one of Jehovah's Witnesses consecrated to bear witness concerning the Kingdom of Jehovah God. He was arrested while going about the streets of the City of Opelika holding pamphlets in his hand and saying to the public: "Get your two copies for five cents." The pamphlets were entitled "Facsism or Freedom" and "Face the Facts and Learn the Only Way of Escape," and generally set forth the gospel of the Kingdom of God as he and others of his persuasion believed and preached it. Regarding himself as sent by Jehovah God to do His work and contending that an application for license would have been an act of disobedience to Jehovah's Commandment, he neither sought nor secured a license or offered to pay the $10 tax prescribed by the ordinance for an annual license for book agents, in which category petitioner was placed. He was arrested, convicted first in the Recorder's Court of the City of Opelika and subsequently on appeal in the Circuit Court on the charge of selling or offering for sale books without a license being first obtained from the Clerk in accordance

with the "City License Schedule of 1939" (R. 11, 16, "City License Schedule for 1939" Section 4, R. 22). On appeal, the Court of Appeals of Alabama held that the conditions and provisions of the City License Schedule, as applied to petitioner, were invalid and the conviction was set aside. On a petition for certiorari filed by the City of Opelika, the Supreme Court of Alabama reversed the Court of Appeals and remanded the cause to said court for further proceedings therein.

ARGUMENT.

A. Jurisdictional.

The Judgment of the Supreme Court of Alabama Sought to be Reviewed is Not a "Final Judgment or Decree," and Hence Not Subject to Review by the Supreme Court Under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)), invoked by petitioner is unavailable to him as the judgment sought to be reviewed is not a "final judgment or decree" within the meaning of that section. After petitioner's conviction in the Recorder's Court and Circuit Court, the Court of Appeals of Alabama set aside the conviction because of alleged Constitutional infirmities in the ordinance as applied to petitioner (R. 61-65). On May 22, 1941, the Supreme Court of Alabama granted a petition for certiorari to the Court of Appeals of Alabama and adjudged as follows:

> "It is therefore considered that the judgment of the Court of Appeals be reversed and annulled, and the cause remanded to said court for further proceedings therein." (R. 2-3.)

This is not a final judgment in fact or as contemplated by Section 237 (b) of the Judicial Code, which provides for review of "any cause wherein a final judgment or decree has been rendered * * *". On this subject, this Honorable Court has said:

"We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. * * *

"We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. * * *" (*Haseltine* v. *Central Bank of Springfield, Missouri*, 183 U. S. 130, 131; See also *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Louisiana Navigation Company* v. *Oyster Commission of Louisiana*, 226 U. S. 99).

Applying this doctrine to the case at hand, it is apparent that review in this Court may not be had at this stage of the proceedings. It is self-evident that the court's decision does not finally dispose of the matter, as the intermediate court was specifically by it ordered to conduct further proceedings. In accordance with the rule just stated it is unnecessary to go beyond this point to establish the proposition that the judgment in question is not ripe for Supreme Court review. It is to be observed in passing, however, that under the reversal and remand to the intermediate court that court quite conceivably could consider other factors presented to it and take such proceedings which might result in a different decision either sustaining or reversing the conviction of the trial court.

B. The Merits.

(1) The Opelika "City License Schedule for 1939" Brought in Question is a Valid Exercise of the Municipality's Police and Taxing Powers and in No Way Abridges or Restricts Petitioner's Right of Free Speech, Press or Conscience.

The ordinance here involved does not in any respect purport to prohibit petitioner or anyone else from distributing literature pertaining to religious or any other subjects or from engaging in the business of book agent or seller. Nor does it restrict in any sense his freedom to worship in what-

ever manner he sees fit. It has no such purpose deliberately, nor can it be said that it creates such results inadvertently. It is a plain, ordinary municipal business privilege or license tax similar to those employed in numerous communities throughout the country, and is free of any of the pernicious characteristics attributed to it by petitioner. It was not meant as,—nor does it result in any form of prior licensing or censorship contrary to our Constitutional guaranties.

As will be seen on inspection, the ordinance lists alphabetically the various trades, professions and vocations plied in Opelika, and as a catch-all sets up a procedure for the establishment of new classifications not specifically set forth. A rate of tax or license fee is prescribed for each classification so listed. The ordinance creates no conditions precedent to the issuance of the license save the payment of the fee charged. In the present case, petitioner as a book agent was required to pay $10 for which, if he had applied, he would unquestionably have received an annual license. There are no requirements that the City satisfy itself as to the qualifications of the licensee or the material to be sold and distributed. On the contrary, it is clear under the plain language of this ordinance that the City would be without authority to refuse issuance of a license to petitioner upon the tender of the specified fee, and if, under such conditions, the City did refuse, mandamus would lie to enforce its delivery. *Marbury* v. *Madison*, 1 Cranch 137.

Something entirely different was involved in the case of *Lovell* v. *Griffin*, 303 U. S. 444, cited as though conclusive on the problem by petitioner. In that case, the City of Griffin was engaged not in routine business privilege licensing but in affirmatively prohibiting the distribution of "circulars, handbooks, advertising or literature of any kind" as a nuisance unless specific permission from the city manager had been obtained. This indeed was something different from the ordinance involved in the instant case. Here was no perfunctory issuance of licenses to engage in any business upon payment of a fee, but rather a prohibition against dis-

tribution of press material without prior government approval. Such an ordinance properly was declared void on its face as striking "at the very foundation of the freedom of the press by subjecting it to license and censorship"[1] but it bears no relationship to the ordinance involved herein.

It cannot be said that merely because both ordinances employ the word "license" that they must of necessity relate to the same thing. The word "license" has been used to mean many different things, and its range of definition is extensive. As used in the ordinance in the *Lovell* case, it connoted prior censorship, examination of material and ultimate permission to distribute based thereon. As used by the City of Opelika in its "City License Schedule of 1939" it is employed for little purpose other than to designate the fee charged with respect to the various avenues of endeavor listed.[2] Certainly it implies nothing so sinister as a previous restraint on the business of publishing and distributing press material. Such was the holding of the Supreme Court of Arizona in *Giragi* v. *Moore*, 48 Ariz. 33, 110 A. L. R. 314, 323; when it said:

> "First it is said that the requirement that persons obtain a license before engaging or continuing in a busi-

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[1] *Lovell* v. *Griffin, supra*, p. 451.

[2] Indeed, with marked frequency the word "license" is employed throughout the ordinance as though it were synonymous with the words "fee" or "tax". E. g.,

"* * * half of such *license* shall be charged and collected, * * *." (Sec. 2.)

"* * * the City of Opelika shall have a lien for such *license* * * * as of the date the *license* is due, * * *." (Sec. 5).

"* * * shall pay the same *license* for such vocation, exhibitions or profession * * *." (Sec. 6.)

"* * * who shall thereon fix a reasonable *license* for such business or vocation * * *." (Sec. 12.)

"* * * shall pay such *license* on or before the day such business or vocation is actually begun * * *." (Sec. 13.)

"All *licenses* will become delinquent * * * and an amount equal to 10 per cent of the amount of such *license* will be added * * *." (Sec. 14) (Italics Supplied)

ness subject to the tax is a previous restraint on such business, in this case on the business of publishing a newspaper. *No condition except payment of a license fee is attached to the issuance of the license. All persons who pay the fee are entitled to receive a license* and for whatever location it may be applied for. * * * " (Italics supplied)

And this Court dismissed an appeal from that decision "for want of a substantial federal question". (301 U. S. 670.)

The City of Opelika has enacted no legislation forbidding or in any way restricting dissemination of information by pamphlet, book, or otherwise. It has, on the other hand, created a license schedule calling for payment of certain fees by those wishing to engage in commercial callings including that of "book agent". This Court has held similar municipal legislation valid:

> "We are not to be taken as holding that commercial soliciting or canvassing may not be subjected to such regulations as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such object as the petitioner. Doubtless there are other features of such activities which may be regulated in public interest without prior license or other invasion of constitutional liberty. * * * " *Schneider* v. *State*, 308 U. S. 147, 155.

A question cognate to this was presented in *Cox et al* v. *State of New Hampshire*, 312 U. S. . . . . (decided March 31, 1941). There, a New Hampshire statute provided that parties desiring to parade through public streets must first secure a license and pay a prescribed fee therefor. Certain Jehovah Witnesses, ignoring the provisions of this statute, paraded through the streets of Manchester displaying signs bearing such legends as, "Religion is a Snare and a Racket" and "Fascism or Freedom—Hear Judge Rutherford and Face the Facts," without securing a license or paying the fee in accordance with the statutory requirement.

Holding that a government could, without impinging on constitutional rights, adopt such reasonable regulations pertaining to the use of its public ways, this Court said:

> "If a Municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state Court contravened any constitutional right."

And an ordinance of the City of Manchester (also challenged by members of the Company of Jehovah's Witnesses) requiring peddlers or canvassers to obtain a badge of identification prior to selling on the streets was found valid and not subject to the charge of unlawful restriction on the freedom of press or the free exercise of religion. In its opinion, the Circuit Court of Appeals said:

> "By contrast the Manchester ordinance now before us contains no element of prior censorship upon the distribution of literature. It requires only a simple routine act of obtaining a badge of identification before a person can sell on the streets. This reasonable police regulation, in our opinion, imposes no substantial burden upon the freedom of the press, or the free exercise of religion.
>
> No doubt, as in the case of any regulatory law, there is the possibility (though the record indicates no likelihood of it) that officials might act arbitrarily and in excess of their rightful powers in administering the ordinance. The superintendent of schools might arbitrarily withhold licenses from Jehovah's Witnesses, despite his mandatory duty to issue the badges upon receipt of applications 'properly executed'. A license once given might be revoked upon some trumped-up pretext. By Section 3, the badge-holder is required to conform to the ordinances of the City and the regulations of the board of mayor and aldermen; some outrageous regulation might be issued, and for non-compliance with

it a license might be revoked under Section 4. What the legal situation would be if any of these or other possibilities came to pass need not be examined now. It suffices to say that recognition of such possibilities does not render the ordinance void on its face, nor justify an injunction at the behest of persons who have failed to take the simple step of applying for a badge—a badge which, so far as the record indicates, would have been issued out of hand, as a matter of routine ministerial duty." *City of Manchester et al.* v. *Leiby*, 117 F. (2) 661.

On April 7, 1941 this Court denied certiorari. 313 U. S. .....

There are no constitutional inhibitions against the levying of license or privilege taxes or the enforcement of reasonable regulations on those engaged in press activities. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 133; *Giragi* v. *Moore*, 48 Ariz. 33, 301 U. S. 670; *Arizona Publishing Co.* v. *O'Neil*, 22 F. S. 117, Certiorari denied, 304 U. S. 543.

In the recent case of *Donnelly Corporation* v. *City of Bellevue*, 283 Ky. 152, 140 S. W. (2d) 1024 (decided May 21, 1940) involving an ordinance requiring a $25.00 privilege license for the distribution of pamphlets and circulars, the Court of Appeals of Kentucky held inapplicable the doctrine of the *Lovell case, supra*, and upheld the right of the community to impose the license requirement. So striking is the parallel between the facts of that and the instant case, the language of the Court should be of interest:

"There is, however, a clear distinction between the ordinances held by the Supreme Court to be abridgments of the right of free speech and press and the ordinance before us. It does not undertake either to prohibit or restrict the distribution of literature of any sort. It only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner. Absent from the ordinance is any censorship of substance or form. No power of discrimination as

between any persons or class of citizens is reserved or exercised. The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission, but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter but for exercising the privilege without paying the tax. * * *"

(2) The License Requirement Being Valid on Its Face Required Observance, and Petitioner Cannot Be Heard to Complain of a Revocation Clause in No Way Prejudicing Him.

The requirement that petitioner pay for and secure a license to engage in the calling of book agent was valid on its face and petitioner's conduct in offering books for sale without securing such license subjected him to the penalties set forth in the ordinance. He is in no position to "complain because of his anticipation of improper action in administration." *Smith* v. *Cahoon*, 283 U. S. 553. See also *Lehon* v. *Atlanta*, 242 U. S. 53.

It is charged that Section 1 of the ordinance, which provides for revocation of licenses in the discretion of the City Commission "with or without notice to the licensee",[1] is invalid and for that reason petitioner was entitled to ignore the ordinance *in toto*. No license having been sought or obtained by petitioner the question of the validity of that section of the ordinance having to do with revocation thereof is not germane. *Ex Parte Byrd*, 84 Ala. 17, 4 So. 397; *Little* v. *City of Attalla*, 4 Ala. Appeals 287, 58 So. 949. Its invalidity could only be of significance if the section were inseparable, thus rendering the entire ordinance void. *Smith* v. *Cahoon*, *supra*.

Section one, however, is separable from the ordinance, and if invalid does not vitiate the whole. The ordinance contains a section which provides:

[1] Record p. 22.

"Should any section, condition, or provision or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule." (R. 38.)

It is now well settled that a provision such as this creates the presumption that, eliminating invalid parts, the legislature would have been satisfied with the remainder, and reverses any presumption that the legislature intended the act to be effective as an entirety or not at all. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, *Electric Bond and Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419.

Furthermore, irrespective of the separability clause, it is otherwise clear that the legislative intent, namely to create a schedule of taxes and fees assessable against those engaging in business in Opelika, is fully carried out to all intents and purposes even though section one were struck down. To preclude revocations without notice does not alter the principle aim of the ordinance. Nor does it make obscure that about which the legislature intended to legislate.

Brazee v. *Michigan*, 241 U. S. 340.
Railroad Retirement Board v. *Alton*, 295 U. S. 330
Carter v. *Carter Coal Co.*, 298 U. S. 238
Ratta v. *Healy*, 1 F. S. 669.

See also:

Sloss-Sheffield Steel & Iron Co. v. *Smith*, 175 Ala. 260, 57 So. 29
Ex Parte Bizzell, 112 Ala. 210, 21 So. 371
Mayor and Aldermen of Birmingham v. *Alabama Great Southern Railroad Co.*, 98 Ala. 134
Lowndes County v. *Hunter*, 49 Ala. 507.

In *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419, (decided March, 1938) the peti-

tioner was not permitted to attack the constitutionality of the registration provision of the Public Utility Holding Company Act by contending they were inseparably connected with allegedly invalid regulatory provisions not yet employed by the Commission. This Court upheld the registration provision without regard to the regulatory provisions because it found that Congress had a definite purpose in the registration itself unaffected or changed by the regulatory sections.

The present case presents a parallel situation. The principle purpose of the ordinance is the licensing itself and the collection of the prescribed fees. This aim is unaffected by the regulatory section dealing with revocations and consequently is left intact even though Section One were found to be invalid.

CONCLUSION.

No adequate reason for certiorari is presented. The petition should be denied.

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